Supreme Court, U.S.
FILED

981292 FEB 10 1999

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FOREST COMMODITIES CORPORATION
and PEEPLES INDUSTRIES, INC.,

Petitioners,

vs.

CONSTRUCTION AGGREGATES, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the voluntary dismissal of certain claims without prejudice prior to the entry of an order adjudicating all claims remaining before the District Court where the Order adjudicating all remaining claims results in a Judgment which can be executed upon renders an appeal from the Order and Judgment adjudicating all remaining claims non-final so as to deprive the Court of Appeals of jurisdiction.

PARTIES TO THE PROCEEDING

The caption of the case contains a complete list of all of the parties.

STATEMENT PURSUANT TO RULE 29.6

The parent corporation of Respondent Construction Aggregates, Ltd. is Lonestar Industries, Inc.

The parent corporation of Petitioner Forest Commodities Corporation is Petitioner Peeples Industries, Inc. Forest Commodities Corporation does not have, or partially own, any nonwholly owned subsidiaries. Peeples Industries, Inc. does not have, or partially own, any nonwholly owned subsidiaries.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL OPINIONS OR ORDERS ENTERED IN THE CASE

The July 31, 1998 decision holding that the United States Court of Appeals for the Eleventh Circuit is without jurisdiction is reported at *Construction Aggregates, Ltd. v. Forest Commodities Corp.*, 147 F.3d 1334 (11th Cir. 1998) (Appendix A).

The decision denying Appellant's Suggestion of Rehearing (or Hearing) En Banc is not published, but is included in the Appendix F.

STATEMENT OF JURISDICTION

The Order sought to be reviewed was entered on July 31, 1998. Appellant's Suggestion of Rehearing (or Hearing) En Banc was denied by Order entered on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

STATUTORY PROVISION AND RULE INVOLVED

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Civ. P. 54(b):

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

Respondent filed its original complaint in the United States District Court for the Southern District of Georgia seeking to recover amounts alleged to be held under certain notes. Jurisdiction was invoked in the District Court under 28 U.S.C. § 1332 as the matter in controversy exceeded the sum or value of $75,000 exclusive of interest and costs and was between citizens of a state and citizens or subjects of a foreign state. Petitioners asserted counterclaims. By means of an Order dated November 6, 1996, Petitioners dismissed Count I of their counterclaims dealing with the property damage caused by Respondent without prejudice in accordance with a Consent Order, leaving the counterclaim relating to obligations under a separate contract. (R2-44). Petitioners filed a motion for partial

summary judgment in regard to the enforceability of the language relating to the guaranteed annual minimum set forth in the August 1, 1994 contract between Construction Aggregates, Ltd. and Forest Commodities Corporation that was at issue in Petitioners' remaining counterclaim. (R1-34). Respondent filed a counter-motion for summary judgment as to the same issue. (R1-37). On December 18, 1996 the District Court entered its Order granting the motion for partial summary judgment filed by Respondent Construction Aggregates, Ltd. and denying the motion for partial summary judgment filed by Petitioners. (R2-47). Subsequently, under the terms of a Consent Order dated July 3, 1997 (R2-50), the other pending issues existing between the parties were resolved so as to render a final judgment for appeal purposes. (R2-51). Specifically, Respondent obtained a judgment on the notes referenced in its complaint in the amount of $342,058.15. (R2-51). A timely notice of appeal was filed by Petitioners on July 11, 1997. (R2-52). After submission of briefs on the merits and as to the jurisdictional issue addressed herein, and after oral argument both as to the merits and as to the jurisdictional issue addressed herein, a panel of the United States Court of Appeals for the Eleventh Circuit entered its decision on July 31, 1998 dismissing the present appeal for lack of jurisdiction. Petitioners' Suggestion of Rehearing (or Hearing) En Banc was subsequently denied by means of an Order dated November 12, 1998. The Consent Order and Judgment dated July 3, 1997 at issue expressly adjudicated all claims asserted by Respondent by fixing the amount owed by Petitioners to Respondent jointly and severally. (R2050). No counterclaims of the Petitioners were left pending. (R2-50-51). It is apparent from the Consent Order that the Order resolved all pending claims as to all parties. Following the Consent Order, there were no remaining claims of any type before the District Court. The fact that all pending claims had been adjudicated was recognized by the District Court in the conclusion of the Consent Order and a separate Judgment was entered. (R2-50-4, R2-51).

REASONS FOR GRANTING THE WRIT

This case presents significant issues concerning the jurisdiction of the federal Courts of Appeals. Despite the fact that the Respondent has obtained a judgment upon which the Respondent could execute except for the posting of an appeal bond in this case and the fact that there are no issues remaining for adjudication before the District Court, Appellants have been denied consideration of their appeal on the merits. There is no question that the District Court and the parties intended for appellate review of the issues raised. Dismissal of this appeal on jurisdictional grounds is not supported by any Supreme Court precedent and, in fact, is contrary to the practical construction of 28 U.S.C. § 1291 endorsed by the precedent of this Honorable Court and the plain language of FED. R. CIV. P. 54(b). The panel's decision in the Court of Appeals below was founded on one case, *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995). The result in *Mesa* is not supported by the authorities cited in *Mesa* and, indeed, is contrary to other Eleventh Circuit precedent. *See Black v. Broward Employment & Training Admin.*, 846 F.2d 1311 (11th Cir. 1988); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005 (11th Cir. 1986). Review here is needed to determine whether the very broad exception to finality of judgments now being derived by the Eleventh Circuit from the *Mesa* opinion is warranted. While it is true that the parties and the district court cannot confer jurisdiction on the Court of Appeals, it is also true that the Court of Appeals must exercise jurisdiction where jurisdiction exists under 28 U.S.C. § 1291.

Under 28 U.S.C. § 1291, "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170, 94 S. Ct. 2140, 2149, 40

L. Ed. 2d 732 (1974). This Court, however, has described a final decision as a "decision by the District Court that 'ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 2457, 57 L. Ed. 2d 351 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945)).

FED. R. CIV. P. 54(b) states:

> **Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of a judgment adjudicating all the claims and the rights and liabilities of all the parties.

There is nothing on the face of FED. R. CIV. P. 54(b) to suggest that claims for relief are still presented in an action after those claims have been voluntarily dismissed without prejudice. If an order adjudicates all claims that remain before the District Court after dismissal without prejudice of certain claims, the order clearly terminates the pending action. The

order and judgment at issue in this case would not appear to be "subject to revision." Unless Petitioners are successful on the merits of this appeal there will be no further proceedings in this case. There is substantial authority for the proposition that a party may expedite the appeal of an adverse ruling that disposes of fewer than all the claims in the action by voluntarily dismissing the remaining counts. Courts of appeals, however, appear to be divided as to whether the remaining claims must be dismissed with prejudice. According to Moore's Federal Practice 3d, 41.40[7][e],

> [t]he Second, (*See Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987); *Atlanta Shipping Corp. v. Chemical Bank*, 818 F.2d 240, 246 (2d Cir. 1987), *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996)), Third, (*See Fassesett v. Delta Kappa Epsilon (NY)*, 807 F.2d 1150, 1155 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987)), Fifth, (*See Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 300 (5th Cir. 1978)), Ninth, (*See Dannenberg v. Software Toolworks, Inc.* 16 F.3d 1073, 1078 (9th Cir. 1994)), Tenth, (*See Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992)), and Eleventh Circuits, (*See Mesa v. United States*, 61 F.3d 20, 21 (11th Cir. 1995)) require dismissal with prejudice for the reasons underlying the final judgment rule, while the Sixth, (*See Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987); *Bogorad v. Eli Lilly & Co.*, 768 F.2d 93, 94 (6th Cir. 1985); *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980)) and Eighth Circuits, (*See Chrysler Motors Corp. v. Thomas Auto Co. Inc.*, 939 F.2d 538, 540 (8th Cir. 1991)) have permitted appeals when the unadjudicated claims were dismissed without prejudice. The Seventh, (*Compare, Division 241*

> *Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1266 (7th Cir.), *cert denied*, 429 U.S. 1029 (1976) *with Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1435-1436 (7th Cir. 1992)) and Eleventh Circuits, (*Compare*, *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1007-1008 (11th Cir. 1986) *with Mesa v. United States*, 61 F.3d 20, 22 n.5 (11th Cir. 1995)) have displayed intra-circuit conflicts on this question.

Petitioners submit there is not a reported decision substantially identical to the present case. For the most part, cases that have held that an order was not appealable as not final because of the dismissal without prejudice of certain claims involved situations where certain of the plaintiffs' claims had been adjudicated adversely to the plaintiff and review of the adverse ruling on certain counts was sought through voluntary dismissal of the remainder of the plaintiffs' claims. In none of these cases did the plaintiff actually obtain a judgment upon which it could levy. If the judgment entered in favor of Construction Aggregates, Ltd. in this case is not a final judgment, Appellants are at a loss to know what form of judgment it is. The circumstances of this case warrant a practical approach to finality. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S. Ct. 308, 311, 13 L. Ed. 2d 199 (1964); *National Boiler Marketing Association v. United States*, 436 U.S. 816, 98 S. Ct. 2122, 56 L. Ed. 2d 728 (1978). Permitting an appeal under the circumstances of the present case would not undermine the purposes of the final judgment rule. *See Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981). There is no danger in this case of undermining the independence of the district judge since he was fully aware of the terms of the Consent Order and approved its terms. *See Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987). There is no danger that the opposing party will be subjected to harassment or undue costs since the terms of the Consent Order

were negotiated at arms length between parties of equal standing. Efficient judicial administration would also not be thwarted. Only issues adjudicated by the district court are being appealed and there is nothing left for the court to do but execute the judgment if the appeal is unsuccessful. The fact that claims that were voluntarily dismissed may or may not be the subject of other future litigation does not change the fact that plaintiff has obtained a final judgment upon which it can levy and that no claims remain pending in the District Court.

CONCLUSION

Wherefore, Petitioners Forest Commodities Corporation and Peeples Industries, Inc. respectfully submit that an improper limitation has been placed on the "final judgment rule" by the United States Court of Appeals for the Eleventh Circuit that is not supported by any Supreme Court precedent and, in fact, is contrary to the practical approach to finality endorsed by applicable decisions of this Honorable Court. The result obtained in this case is further contrary to the clear language of FED. R. CIV. P. 54(b) and the decisions and other precedent both in the Eleventh Circuit and in other circuits. For all the foregoing reasons, Petitioners Forest Commodities Corporation and Peeples Industries, Inc. respectfully submit that a Writ of Certiorari should issue to review the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 31, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-8745

D. C. Docket No. CV 496-58

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff-Counter-
Defendant-Appellee,

versus

FOREST COMMODITIES CORPORATION, PEEPLES INDUSTRIES, INC.,

Defendants-Counter-
Claimants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

(July 31, 1998)

Before EDMONDSON and BIRCH, Circuit Judges, and LAWSON*, District Judge.

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* Honorable Hugh Lawson, U. S. District Judge for the Middle District of Georgia, sitting by designation.

Appendix A

PER CURIAM:

Forest Commodities Corp. and Peeples Industries, Inc. ("FCC") appeal the district court's grant of partial summary judgment in favor of Construction Aggregates, Ltd. ("CAL") on the enforceability of a shipping agreement provision. Because the pertinent order of the district court was no final judgment for all the claims presented in the district court, we must dismiss this appeal for lack of jurisdiction.

BACKGROUND

In 1994, CAL and FCC agreed that CAL would use FCC's ocean terminal in Savannah to unload aggregate for delivery to CAL's customers. Under the agreement, if CAL failed to ship 150,000 tons of aggregate a year through FCC's terminal, CAL would pay FCC $1.50 per ton for each ton under the 150,000 pound minimum. This provision for the "fall-short" is at the center of the parties' dispute.

In May 1995, the riverbank at FCC's terminal collapsed under the weight of the aggregate unloaded by CAL. To provide money for the repair of the facility and to allow completion of the agreement, CAL lent almost $320,000 to FCC using four promissory notes.

When FCC defaulted on the notes, CAL sued FCC. FCC made two counterclaims seeking an offset of damages or recovery: First, that CAL negligently caused the collapse of the riverbank at the Savannah facility, and second, that CAL breached the original agreement by not shipping at least 150,000 tons through the facility and, therefore, owed FCC liquidated damages — $1.50 a ton for each ton below 150,000 tons — or

actual damages.[1] In November 1996, a consent order dismissed, without prejudice, FCC's first counterclaim: the negligence claim. Both parties sought partial summary judgment on the issue of whether the fall-short provision was enforceable as a liquidated damages claim. In December 1996, the district court ruled in CAL's favor that the fall-short provision was unenforceable.

The District Court entered a second consent order in July 1997. In this consent order, the parties agreed that CAL would have a judgment against FCC on the four promissory notes; and FCC, then, dismissed without prejudice FCC's second counterclaim: the "fall-short" contract claim based not on liquidated damages, but actual damages. FCC expressly reserved the right to re-file its claim for actual damages.

FCC then appealed the partial summary judgment in CAL's favor: the declaration that the liquidated damage claim was unenforceable. We noted potential jurisdictional problems and gave the parties an opportunity to provide supplemental briefs on jurisdiction.

DISCUSSION

Under 28 U.S.C. § 1291, the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts." This section is the basis for the final judgment rule,

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1. FCC's counterclaim and amended counterclaim do not clearly distinguish the claim for actual damages from the claim for damages under the fall-short provision. That the parties and the district court accept that FCC made a claim for actual damages is demonstrated by the second consent order, which expressly reserves FCC's claim to actual damages.

which ordinarily requires that all claims and issues in a case be resolved before appeal.[2]

The first question, then, is whether this case presents a final decision. We are guided by *Mesa v. United States*, 61 F.3d 20 (11th Cir. 1995). In *Mesa*, the plaintiff's complaint set out several claims. The district court dismissed the plaintiff's claims under Counts I and II, leaving some others. *See id.* at 21. To appeal the dismissal of Count II, the *Mesa* plaintiff moved to dismiss without prejudice the remaining counts. *See id.* The district court granted his motion and dismissed the remaining claims without prejudice. *See id.* On appeal, we concluded that no appellate jurisdiction was available. *See id.* at 22.

Although this case involves a counterclaim instead of just a complaint, this case is not significantly different from *Mesa*. Like the *Mesa* plaintiff, FCC agreed to relinquish potentially meritorious claims to pursue an appeal, but those claims were dismissed without prejudice. FCC argues that several distinctions exist between this case and *Mesa*, but the distinctions are not material.

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2. If a party wants to appeal fewer than all the claims, the district court — for proper appellate jurisdiction — must certify, under Fed. R. Civ. Proc. 54(b), that no just reason exists for delay and expressly direct an entry of judgment. *See Penton v. Pompano Constr. Co., Inc.*, 963 F.2d 321, 321-22 (11th Cir. 1992). No rule 54(b) certification is present in this case.

For another means of making a district court order appealable even when it is not final, see 28 U.S.C. § 1292(b).

First, FCC argues that the notice of appeal in *Mesa* came before the voluntary dismissal of the claims. If this observation is true, it is not clear from the *Mesa* opinion. And, the *Mesa* court did not treat this circumstance as material to its judgment. In addition, the chronology would not seem to affect jurisdiction because voluntary dismissals, granted without prejudice, are not final decisions. *See Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978)[3] (*Ryan* is a precedent relied upon by the *Mesa* court).

Second, FCC argues that — unlike *Mesa*, where the plaintiff dismissed his claim — this case involves a consent order where both parties agreed to dismissal. FCC and CAL, however, cannot agree to grant this court jurisdiction. *See Haney v. City of Cumming*, 69 F.3d 1098, 1101 n.4 (11th Cir. 1995). Furthermore, the policies underlying the *Mesa* decision still apply here. The second consent order expressly preserves FCC's right to refile the same claim, one seeking actual damages ("It being expressly contemplated that Defendant may commence an action in the future . . . ."). If this court were to affirm the partial summary judgment for CAL, it is possible that FCC would re-file its second counterclaim as a suit for actual damages.[4] This act would undermine the policies of judicial

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3. FCC claims that the notice of appeal in *Ryan* also came before the Ryan plaintiff's voluntary dismissal of the remaining claims, but this assertion is clearly contradicted by the *Ryan* opinion. It states: "[T]he district court granted . . . Ryan's motion for a voluntary dismissal of the single substantive allegation that remained . . . . Hereafter Ryan filed a notice of appeal . . . ." *Ryan*, 577 F.2d at 300.

4. FCC's desire to keep the door open for future litigation of actual damages is clear from the second consent order: "[A]ny claim

(Cont'd)

efficiency, avoiding piecemeal litigation, and district court independence that are the basis of the final judgment rule. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).[5]

Third, FCC argues that it makes no sense to require the parties to continue litigating a claim (that is, the second counterclaim) they say they were not required to bring in the first place. That the second counterclaim was just a permissive counterclaim is not clear.[6] But, whether FCC was, in some

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(Cont'd)
by [FCC] for breach of the Agreement through proof of actual damages caused to [FCC] rather than through reliance upon the $1.50 per ton fall-short figure referenced in the Agreement is expressly preserved."

5. The use of a consent order eliminates concerns about harassment of the other party, *see Firestone Tire & Rubber Co.*, 449 U.S. at 374, but the remaining policies are sufficient to justify application of the final judgment rule in this case.

6. Compulsory counterclaims are those that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). A claim arises out of the same transaction or occurrence if there is a "logical relationship" between the claims. *Republic Health Corp. v. Lifemark Hosps. of Florida, Inc.*, 755 F.2d 1453, 1455 (11th Cir. 1985). It might be that FCC's counterclaim for breach of the shipping agreement is not logically related to CAL's claim that FCC defaulted on the loan agreement and is, therefore, a permissive counterclaim. It might also be, however, that FCC's counterclaim does arise out of the same transaction or occurrence because the loan agreement says that FCC's unloading facility shall be rebuilt "so that CAL and FCC can continue to carry out the terms of the [shipping] agreement." We do
(Cont'd)

sense, required to file the counterclaim or not is beside the point. FCC did file a counterclaim, adding new claims to the case; and it is that real case — the one presenting multiple claims by multiple parties — at which we must look. Also, we are not requiring the parties to continue litigation. All that FCC must do to appeal the partial summary judgment is have its remaining claims dismissed with prejudice. *See Morewitz v. West of England Ship Owners Mut. Protection and Indem. Ass'n*, 62 F.3d 1356, 1361 (1995).

Because all of the claims in the district court have not been finally decided, FCC's appeal must fit within an exception to the finality rule for us to have jurisdiction. FCC claims that the appeal falls within the *Jetco* exception. *See Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). *Jetco* allows an exception to the finality rule when "a series of court orders, considered together, terminate[d] the litigation as effectively as a formal order." *Mesa*, 61 F.3d at 21. In *Jetco*, the plaintiff appealed an order dismissing his claim against one of three defendants, but before the appeal was heard, his claims against the other defendants were dismissed with prejudice. *See Jetco Elec. Indus.*, 473 F.2d at 1231.

Again, *Mesa* (and its ancestor *Ryan*) guides our resolution of this argument. *Mesa* and *Ryan* rejected the use of the *Jetco* exception because, in *Jetco*, the plaintiff had no claims left if his appeal failed. *Mesa*, 61 F.3d at 22; *see also Jetco Elec. Indus.*, 473 F.2d at 1230-31. In *Mesa* and *Ryan*, however, the

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(Cont'd)

not decide (because we need not) whether FCC's counterclaim was compulsory. But we point out that FCC's assertion, that it could have always asserted its counterclaim as a later independent action, might be incorrect.

plaintiff's claims were dismissed without prejudice. *See Mesa*, 61 F.3d at 21; *Ryan*, 577 F.2d at 302. If the appeal failed in *Mesa* or *Ryan*, therefore, the plaintiff could re-file other claims. For this reason, the *Mesa* and *Ryan* courts rejected the use of the *Jetco* exception. *See Mesa*, 61 F.3d at 22; *Ryan*, 577 F.2d at 302. FCC, if its appeal fails, still has a claim for actual damages available because the district court dismissed FCC's claim without prejudice. As in *Mesa* and *Ryan*, this remaining claim precludes the use of the *Jetco* exception.

We are without jurisdiction to hear this appeal.

APPEAL DISMISSED.

APPENDIX B — CONSENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED JULY 3, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV496-058

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff,

v.

FOREST COMMODITIES CORPORATION AND PEEPLES INDUSTRIES, INC.,

Defendants.

CONSENT ORDER

The above-captioned action having been scheduled for a pre-trial conference on Friday, May 23, 1997, and the parties having agreed to a resolution of this matter that will obviate the need for trial at this juncture, it is hereby ordered as follows:

1. Defendants Forest Commodity Corporation a/k/a Forest Commodities Corporation ("FCC") and Peeples Industries, Inc. ("Peeples")(FCC and Peeples may be referred to collectively herein as "Defendants") will, subject to the other provisions of this order, consent to the entry of a judgment against them, jointly and severally, in the total amount of $342,058.15. This

amount represents the claim of plaintiff Construction Aggregates, Ltd. ("CAL") for principal, interest, costs and attorneys' fees on the notes in issue ("the Notes").[1] Post-judgment interest shall continue to accrue at 8% per annum in accordance with the terms of the Notes. Subject to the provisions of paragraph 5 below, CAL expressly waives any further claim to attorneys' fees under the terms of the Notes. Also subject to the provisions of paragraph 5 below, CAL agrees that it will not file a motion for costs or attorneys' fees in this civil action pursuant to Rule 54 of the Local Rules of this Court.

2. In agreeing to the entry of the judgment set forth in paragraph 1, Defendants expressly reserve their right to appeal this Court's prior order dated December 18, 1996 ("the 1996 Order"), granting CAL's motion for partial summary judgment. It is understood that the judgment entered in favor of CAL under paragraph 1 above has not been reduced at all by Defendants' defense or counterclaim of offset and Defendants have asserted that if they could enforce the language of the August 1, 1994, contract between CAL and FCC (the "Agreement") held by this Court to be an unenforceable penalty, that any amount which CAL might otherwise be entitled to receive may be subject to reduction based on damages claimed by Defendants

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1. "The Notes" refers to four promissory notes issued to CAL by FCC and Peeples on a joint and several basis as follows: (i) $144,864.36 lent by CAL to FCC and Peeples on June 19, 1995; (ii) $59,544.41 lent by CAL to FCC and Peeples on June 26, 1995; (iii) $80,677.78 lent by CAL to FCC and Peeples on July 3, 1995; and (iv) $34,842.50 lent by CAL to FCC and Peeples on July 10, 1995. All of these notes became due one hundred and twenty (120) days from their issuance. The notes bear interest at a rate of eight percent (8%) per annum, and provide that FCC and Peeples will pay attorneys' fees equal to fifteen percent (15%) of the total amount due under the notes, plus any costs incurred in collecting the amounts, if any of the notes are in default.

to be due under the contractual language previously examined by the Court. It is recognized that if the 1996 Order were to be reversed or vacated on appeal, the judgment currently consented to may be subject to adjustment. Accordingly, it is understood that the judgment to be entered under paragraph 1 of this order is subject to the appeal of the 1996 Order and that Defendants' consent to the entry of that judgment will not bar Defendants from contesting the amount, if any, ultimately due to CAL if the 1996 Order is reversed or vacated on appeal.

3. Any claims of Defendants other than their claim for an offset and/or recovery based on the express contractual language held by this Court in the 1996 Order to be an unenforceable penalty, are dismissed without prejudice. Specifically, without limiting the generality of the foregoing, any claim by Defendants for breach of the Agreement through proof of actual damages caused to Defendants rather than through reliance upon the $1.50 per ton fall-short figure referenced in the Agreement is expressly preserved. CAL expressly acknowledges that it will not assert in any subsequent action or proceeding that Defendants' claims are barred based on an argument that the remaining claims now dismissed without prejudice should have been maintained in this action. Specifically, without limitation, CAL agrees that it will not assert any defense of res judicata or collateral estoppel based on an argument that claims dismissed without prejudice or similar claims could have or should have been maintained in this action or may not be recommenced. It being expressly contemplated that Defendants may commence an action in the future based upon or including claims now dismissed without prejudice, no costs shall be imposed pursuant to Fed. R. Civ. P. 41(d) if such an action should be recommenced.

4. Defendants agree to post a supersedeas bond in substantially the form that is attached hereto and made a part hereof as Exhibit "A" in the amount of $370,000.00. The amount and form of the bond are hereby approved by the Court. Upon filing of the executed supersedeas bond in the approved form, a stay of the execution of or any proceedings to enforce the judgment pending disposition of the appeal of the judgment entered pursuant to this order and the Court's 1996 Order, is granted. If this Court's 1996 Order is affirmed, CAL will have the right to utilize the supersedeas bond to satisfy in full the judgment consented to in paragraph 1 of this order plus any claim for post-judgment interest or costs of the appeal.

5. If FCC is successful on appeal and the Court's 1996 Order is reversed or vacated, CAL has the right to maintain its defenses to Defendants' counterclaims, none of which is deemed to be waived. Specifically, without limiting the generality of the foregoing, CAL reserves the right to allege that Peeples has no claim for offset against CAL because Peeples is not a party to the Agreement, that FCC mitigated its damages, that it failed to act in good faith by refusing to consent to the proposed assignment of the Agreement and in the alternative, that it did mitigate its damages and suffered no injury by virtue of its contract with Martin Marietta Materials, Inc. Moreover, CAL reserves the right, if the 1996 Order is reversed or vacated, to recalculate the amount due under the Notes to include all interest, costs and attorneys' fees due under the terms of the Notes, and to pursue recovery of any costs and attorneys' fees to which it would be entitled aside from those provided for pursuant to the terms of the Notes.

6. To the extent that this case is not remanded to this Court for further proceedings following the appeal of this Court's

1996 Order, the Court agrees that it will nevertheless retain jurisdiction of this matter solely to enforce the terms of this order. *See Kokkonen v. Guardian Life Ins. Co. of America*, __ U.S. __, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

WHEREFORE, in accordance with the foregoing terms, the Clerk of Court is instructed to enter judgment in favor of CAL on its claim against Defendants, jointly and severally, in the total amount of $342,058.15. The Court having previously ruled on Defendants' claim for offset based on a $1.50 per ton damage figure by means of its 1996 Order and all other claims of Defendants having been dismissed without prejudice, final judgment is hereby rendered and this action is hereby dismissed.

SO ORDERED this 3 day of July, 1997.

s/ B. Avant Edenfield
B. AVANT EDENFIELD
United States District Court for the
Southern District of Georgia

Appendix B

CONSENTED TO:

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

s/ Robert S. Glenn, Jr.
Robert S. Glenn, Jr.
Georgia Bar No. 297306
George M. Earle
Georgia Bar No. 237130

Attorneys for Plaintiff

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BOUHAN, WILLIAMS & LEVY LLP

s/ Roy E. Paul
Roy E. Paul
Georgia Bar No. 567675

Attorneys for Defendants

Post Office Box 2139
Savannah, Georgia 31402-2139
(912) 236-2491

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA DATED JULY 3, 1997 WITH SUPERSEDEAS BOND

United States District Court
Southern District of Georgia

CASE NUMBER: CV496-58

CONSTRUCTION AGGREGATES, LTD

v.

FOREST COMMODITIES CORPORATION and PEEPLES INDUSTRIES, INC.

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That in accordance with the decision rendered on the 3rd day of July, 1997, judgment is hereby entered in favor of Construction Aggregates, Inc. on its claim against Defendants, jointly and severally, in the total amount of $342,058.15. Final judgment is hereby rendered and this action is hereby dismissed.

July 03, 1997
Date

Henry R. Crumley, Jr.
Clerk

s/ Nicole M. Thomas
(By) Deputy Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV496-058

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff,

v.

FOREST COMMODITIES CORPORATION AND PEEPLES INDUSTRIES, INC.,

Defendants.

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, FOREST COMMODITY CORPORATION a/k/a FOREST COMMODITIES CORPORATION and PEEPLES INDUSTRIES, INC., as principals, and LUMBERMENS MUTUAL CASUALTY COMPANY, as surety, are held and firmly bound unto CONSTRUCTION AGGREGATES, LTD., in the sum of Three Hundred Seventy Thousand Dollars ($370,000.00) in lawful money of the United States of America, for the payment thereof well and truly to be made to said Construction Aggregates, Ltd., we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Appendix C

The condition of this Bond is as follows:

This Court has entered its judgment dated _____, 1997, in favor of Construction Aggregates, Ltd. against Forest Commodities Corporation/Forest Commodity Corporation and Peeples Industries, Inc. in the amount of Three Hundred and Forty-Two Thousand Fifty-eight and Fifteen Cents ($342,058.15), plus post-judgment interest at 8% per annum, and the Court approved the giving of this Bond in the amount of $370,000.00.

Now, therefore, if the Court's judgment dated and entered on _____, 1997, or prior order dated December 18, 1996, is set aside, vacated or reversed after all appeals or if Forest Commodities Corporation/Forest Commodity Corporation and Peeples Industries, Inc. shall satisfy in full the said judgment, then this obligation shall be null and void; otherwise, payment of the judgment plus post-judgment interest and costs of appeal shall be made hereunder after all appeals.

WITNESS our hands and seals this __ day of _____, 1997.

FOREST COMMODITY CORPORATION
a/k/a FOREST COMMODITIES
CORPORATION
As Principal

By: _____
Elizabeth C. Peeples, President

Attest: _____
Debra M. Strouse, Secretary

Appendix C

PEEPLES INDUSTRIES, INC.
As Principal

By: _____
E. Gay Mayfield, President

Attest: _____
Debra M. Strouse, Secretary

LUMBERMENS MUTUAL CASUALTY COMPANY
As Surety

By: _____
Charles W. Seiler
Its Attorney-in-fact

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED DECEMBER 18, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV 496-058

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff,

v.

FOREST COMMODITIES CORPORATION AND PEEPLES INDUSTRIES, INC.,

Defendants.

ORDER

Plaintiff Construction Aggregates, Ltd. ("CAL") brought this action against defendants Forest Commodities Corporation ("FCC") and Peeples Industries, Inc. ("PII"), to collect nearly $320,000 in unpaid promissory notes. Defendants counterclaimed, seeking a set-off or recoupment under a 1994 CAL-FCC contract. Doc. # 15. Plaintiff and defendants now move for partial summary judgment on one issue: whether the "fall-short" provision of that contract constitutes an unenforceable penalty.

Appendix D

I. *BACKGROUND*

CAL imports and exports aggregate stone. CAL Statement of Material Facts ("CAL Facts") ¶ 1, doc. # 38. FCC owns an ocean terminal facility on the Savannah River, where ships can unload and store bulk cargo for transshipment. *Id.* ¶ 2. In 1994, CAL and FCC entered into a three-year contract under which FCC agreed to provide terminal space for CAL to unload, store and transship aggregate from ships. *Id.* ¶ 3 & Exh. C at 1. In return, CAL agreed to pay FCC $.90 per ton of aggregate unloaded at the site. *Id.* ¶¶ 3 & 10 & Exh. C. ¶ 2. Additionally, CAL promised to unload a minimum number of tons per year, or pay FCC $1.50 per ton for each ton under the minimum. CAL Facts Exh. C at 3; Defendants' 10/23/96 Opposition Brief Exh. A at 3. Finally, the parties agreed that Georgia law governs, CAL Facts Exh. C ¶ 12, and that their respective obligations could not be assigned. *Id.* ¶ 17.

In May, 1995, the riverbank collapsed under the weight of an aggregate shipment being unloaded by CAL. CAL Facts ¶ 18. FCC's dock facility was damaged, jeopardizing the parties' ability to carry out their agreement. *Id.* Unable to pay for the necessary repairs, FCC entered into a loan agreement with CAL. CAL Facts ¶ 18 & Exh. G. PII, the company hired to repair the pier, joined as a party to this agreement. *Id.*

Under the loan agreement, FCC and PII signed promissory notes in exchange for weekly advances from CAL. *Id.* ¶ 4. Moreover, FCC granted CAL a $.75 per ton credit toward repayment of CAL's loan. *Id.* & Exh. G. ¶ 6. Finally, FCC and PII executed four notes totaling $319,929.05, payable 120 days later. *Id.* Following defendants' default, CAL brought this action for the repayment.

FCC and PII counterclaimed, however, alleging that they are entitled to either a set-off or recoupment because: 1) CAL negligently caused the riverbank's collapse; and 2) CAL breached its original contract with FCC by failing to pay $1.50 per ton when it fell below the minimum required "thru-put" tonnage. Answer to Amended Complaint (doc. # 15) at 6-7. Again, however, the parties ask this Court to resolve only the "unenforceable penalty" issue. There is no dispute that CAL has stopped shipping aggregate through FCC's terminal, or that it has no plans do so in the future. M. Power Dep. at 40 (doc. # 42 attachment).

II. *ANALYSIS*

A. Summary Judgment Standards

This Court applies the summary judgment principles explained in *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742-43 (11th Cir. 1996) and *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996).

B. Liquidated Damages — Governing Standards

CAL contends that the $1.50 per ton "shortfall" rate constitutes an unenforceable penalty. In resolving this issue of law, *National Emergency Services, Inc. v. Wetherby*, 217 Ga. App. 42, 44 (1995), Georgia courts apply a three-part test:

> (1) the injury caused by the breach must be difficult or impossible to accurately estimate;
>
> (2) the parties must have intended the provision to provide a measure of damages rather than a penalty; and

> (3) the sum stipulated as liquidated damages must be a reasonable estimate of the probable loss.

Id. at 44; *see also Ryder Truck Lines v. Goren Equip. Co.*, 576 F.Supp. 1348, 1357 (N.D.Ga. 1983) (liquidated damages must be impossible to determine at the time the contract was signed); O.C.G.A. § 13-5-7.

In *Wetherby*, a staffing and placement business which placed Dr. Wetherby with a hospital later sued him for "liquidated damages" of $25,000 under a contract provision that restricted him from working directly for the hospital for two years after termination of the hospital's contract with the company. *Id.* at 42. The *Wetherby* court found that the $25,000 provision passed the first and second parts of the three-part test, but not the third. Because the company's recruitment, placement and lost profit loss evidence was both conclusory and speculative, it was not a "competent estimation of probable loss." *Id.* at 44. Hence, the $25,000 provision constituted an unenforceable penalty. *Id.*; *see also Humana Medical Plan, Inc. v. Jacobson*, 614 So.2d 520, 521-22 (Fla. Dist.Ct.App. 1992) (liquidated damages clause requiring physician to pay HMO $700 for each patient who stayed with him upon his disaffiliation from HMO held unenforceable because it was not a reasonable measure of damages).

C. The "fall-short rate" provision

The FCC-CAL contract's "fall-short rate" provision states:

> **3. Guaranteed Annual minimum.** During the term of this Agreement, CAL shall ship through the Terminal ~~(discharge from vessels and reload onto~~

> ~~trucks)~~ a minimum of 150,000 tons per contract year (twelve (12) month period from August 1, 1994 through July 31, 1995 and each succeeding twelve (12) month period during the term of this Agreement) and agrees to pay $1.50 per tons (sic) for *each ton under* the guaranteed minimum of 150,000 tons per contract year. Annual guaranteed minimum shall be calculated each three (3) month period and settled within thirty (30) days. Tonnage shall be carried back or forward within the contract year.

CAL Facts Exh. C at 3 (emphasis and strikeover in original); Defendants' 10/23/96 Opposition Brief Exh. A at 3 (emphasis in original).

According to FCC, ¶ 3 obligated CAL to pay FCC $.90 per ton if it shipped more than 150,000 tons per year through FCC's terminal. FCC's 10/9/96 Facts ¶¶ 7-8. Thus, if CAL shipped less than 150,000 tons, it would be required to pay FCC $1.50 per ton "for *each ton under* the guaranteed minimum of 150,000 tons per contract year." *Id.*

(1) "Volume Discount"

The parties are less than clear in framing the issue at this juncture. FCC characterizes ¶ 3 as a "volume discount. If less than 150,000 tons are shipped, one rate applies. If more than 150,000 tons are shipped, a lesser rate applies." FCC's 10/23/96 Fact Response ¶ 10. The problem with this interpretation is that FCC fails to clearly state what happens if CAL shipped, for example, only 50,000 tons in a year. Does that mean that CAL would simply have to pay the higher rate

($1.50 per ton) for those 50,000 tons because it failed to ship the "guaranteed minimum" of 150,000 tons, and thus did not qualify for the $.90 "volume discount"? Under that interpretation, CAL would be obligated to pay FCC only $75,000 (50,000 tons x $1.50) for that year, in which case the issue before the Court would be whether the $.60 per ton spread ($1.50 — $.90) CAL would have to pay on those 50,000 tons constitutes an unenforceable penalty.

(2) "Deficit Yield"

FCC offers a second interpretation of ¶ 3 as well. *See* Part C (pp 11-12) of FCC's 10/23/96 brief; Part A of FCC's 10/9/96 summary judgment brief ($1.50 "per ton times the contractual minimum 150,000 tons would generate a minimum revenue of $225,000 if [CAL] walked away from the contract"). Under this reading, FCC would hold CAL to a "deficit yield" formula. *See, e.g., Anera v. Pacific Champion Service Corp.*, 864 F.Supp. 195, 200-01 (D.D.C. 1994).

Along these lines, even if CAL shipped zero tons per year, it nevertheless would have to pay FCC $225,000 (*i.e.*, $1.50 per ton "for *each ton under* the guaranteed minimum of 150,000 tons per contract year"). That is because a zero-shipment year would put CAL at 150,000 tons "under the guaranteed minimum." CAL would thus have every incentive to ship, in one year, not only 150,000 tons (150,000 tons x $1.50 per ton = $225,000), since it would have to pay for that tonnage anyway, but also obtain the "volume discount" of $.90 per ton for every ton it shipped over the 150,000-ton minimum.

If this is the proper interpretation, then the issue before the Court is whether that $225,000 "deficit yield" payment

constitutes an unenforceable penalty. FCC *seems* to be advancing this interpretation in its 5/16/96 Answer To Amended Complaint and Counterclaim (doc. # 15) ¶ 12, where it claims "$450,000 in fall short payments." *See also* doc. # 16 at 4-5 (same); 7/8/96 Joint Status Report at 11-12 & Exh B (doc. # 24); 12/12/96 PTO Exh. F at 12-13. However, FCC does not explain from where it got its $450,000 figure. It somewhat approaches CAL's maximum $675,000 exposure (150,000 tons x $1.50 = $225,000; $225,000 x 3 years = $675,000) under the "deficit yield" interpretation, but on balance it introduces more confusion than clarity into this matter.

Nor does the 10/23/96-filed J. Benton affidavit definitively resolve the matter, though the "minimum cash flow" language employed in ¶ 8 of that document tends to support the "deficit yield" interpretation. And, little guidance is found in the deposition excerpts the parties have provided to the Court. One witness, for example, was simply asked to parrot the contract language:

> Q. Okay. Did you understand that if you did not ship 150,000 tons, that there would be a payment of $1.50 per ton for each ton under the guaranteed minimum of 150,000 tons per contract year?
>
> A. Yes.

M. Power Dep. at 36 (doc. # 43, last attachment); *see also* FCC's 10/9/96 Fact Statement ¶ 8 (rehashing this testimony, but failing to point to any other evidence to elucidate what it means); FCC's 10/9/96 summary judgment brief at 3-4 (same); FCC's 10/23/96 (doc. # 42) brief, last attachment (J. Wood Dep. at 21-22) (identifying, but not explaining intent or meaning of,

¶ 3 of the contract. The only witness who tried to provide some explanation simply failed to state clearly which of the above interpretations FCC now seeks to advance:

> Q. In the . . . contract, there's a $1.50 per ton shortfall or fall-short?
>
> A. Correct.
>
> Q. For the amount not shipped?
>
> A. That's correct.
>
> Q. How's that determined. . . .
>
> A. Well, there's [sic] guarantees that the shipper says they will ship through. If they don't meet their end of the bargain, yes, it's fall-short to pay rent and have income on that property, yeah.
>
> Q. But it's more than 90 cents a ton?
>
> A. Yes, it is.

P. Gnann Dep. (doc. # 42 Exh. B; doc. # 39 Exh. F) at 109.

Hence, the Court has been needlessly burdened. In any event, no "penalty" result can be reached with the "volume discount" interpretation. The volume discount is a common contract element, reflecting economies of scale contained within production and distribution processes. Discounts by definition involve no affirmative obligation to pay any form of damages upon contract abandonment; instead, they merely reflect

variable pricing — a core contract element. No relief can be granted on this interpretation.

The "deficit yield" interpretation is a different matter. With respect to the second element of the *Wetherby* test — that the parties must have intended to provide for damages rather than a penalty — the Court notes at the outset that the parties failed to designate the "fall short" provision a "liquidated damages" clause, rather than a penalty. *See Wetherby*, 217 Ga. App. at 44 (courts "first look to the language of the contract to determine whether the parties intended the provision in question to be a penalty or a legally cognizable liquidated damages clause").

To that end, CAL properly points to the "intent" testimony of FCC's terminal facility manager, Pat Gnann, who participated in the pre-contract negotiations on this issue. J. Wood Dep. at 22 (doc. # 34 attachment); M. Power Dep. at 34-36 (doc. # 34 attachment); W. Covert Dep. at 22-24 (doc. # 39 Exh. E); P. Gnann Dep. at 110-11 (doc. # 39 Exh. F); J. Benton Dep. at 13 (doc. # 39 Exh. A); 10/23/96-filed J. Benton Aff. ¶ 4. After testifying that FCC made a profit at $.90 per ton, P. Gnann Dep. at 106-07, Gnann explained his understanding of the $1.50 per ton short-fall rate, after which he further testified:

> Q. And you said [FCC reaped a profit] at 90 cents a ton. . . . Okay. Then the $1.50 a ton has got a great deal more than you need for your rents and that sort of thing, is that right?
>
> A. Yes.
>
> Q. Is it a penalty for not complying?

A. Sure it is.

[Objection]

Q. You would characterize it as a penalty?

A. Sure, yes.

P. Gnann Dep. at 109-10 (doc. #39 Exh. F); *see also* J. Benton Dep. at 51 (doc. # 39 Exh. A).

FCC's objection to Gnann's testimony, *see id.* and 10/23/96 Fact Response (doc. # 43) ¶ 13, is overruled. *Cf. Joyce's Submarine Sandwiches, Inc. v. Calif. Public Employees Retirement System*, 195 Ga. App. 748, 750 (1990) (reference by landlord's employee to lease's $50/day liquidated damages provision as a "penalty" was not a determinative factor, because it did not reflect landlord's intent at the time the lease contract was formed). As a member of FCC's management, Gnann participated in the contract negotiation/formation process. Moreover, FCC's Benton affidavit does not dispute Gnann's "penalty" testimony, only Gnann's analysis as to how much profit, if any, FCC derived from the $.90 and $1.50 per ton rates.

Turning to element three — whether the $225,000 per year required "fall-short" payment was, at the time the contract was signed, a reasonable estimate of FCC's probable loss — the Court notes that this prong actually contains two distinct components: (a) reasonableness; and (b) ability/duty to mitigate losses. In other words, if a liquidated damages provision requires payment of an amount that is not a reasonable pre-estimate of a probable loss in the event of a breach (*i.e.*, it is

largely an arbitrarily chosen sum), then it will be deemed a penalty. *AFLAC, Inc. v. Williams*, 264 Ga. 351, 354 (1994) (provision contained in corporate counsel's agreement with corporation requiring corporation to pay him 50% of unexpired contract term was an unenforceable liquidated damages penalty in that, *inter alia*, it was an unreasonably high sum and required payment without considering counsel's duty to mitigate his damages); *Ryder*, 576 F.Supp. at 1358.

On the mitigation component, the case law makes clear that it is not reasonable for a seller to demand, as liquidated damages, 100% contract price payment (or something substantially close to that) upon the mere speculation that the market for a product might completely disappear within the contemplated contract term. Applying state law similar to Georgia's, the court in *Superfos Investments v. Firstmiss Fertilizer*, 821 F.Supp. 432 (S.D.Miss. 1993), for example, concluded that a sales contract obligating the buyer to pay for a product that the buyer did not take in compliance with an annual minimum requirement was an unenforceable penalty. *Id.* at 440-41. Requiring the buyer to pay the full price for any shortfall in tonnage would be grossly disproportionate to any actual or unanticipated losses. *Id.* Moreover, it did "not follow from the fact that predicting market conditions is difficult or impossible [makes] it reasonable to assume that there will he no market for the product." *Id.* at 441 (emphasis original).

In contrast, the court in *Ramada Franchise Systems v. Motor Inn Inv. Corp.*, 755 F.Supp. 1570, 1577-80 (S.D.Ga. 1991), enforced a hotel franchise contract liquidated damages clause which called for the payment of the greater of $50,000 or an amount calculated under the percentage of gross room sales. *Id.* at 1577-80. The harm caused by the breach, given the

fluctuating, "whimsy of the public" nature of the hotel/tourist market, was difficult to accurately estimate. *Id.* Moreover, the parties intended the stipulated sum as damages and not a penalty. Finally, the amount was a reasonable pre-estimate of the probable loss resulting from premature termination of license agreement. *Id.*

Turning to the instant case, FCC has referenced deposition testimony showing agreement that the $225,000 amount approximated what FCC, based upon CAL's volume projections, could reasonably expect to reap at a minimum in terms of projected revenues. Doc. # 35 ¶¶ 3-6; doc. # 36 at 5-6.[1] As in *Williams* and *Superfos*, however, that figure requires CAL to pay at least half, if not more of what the parties anticipated would be the entire contract price "*without* considering [FCC's] duty to mitigate [its] damages," *Williams*, 264 Ga. at 354 (emphasis added), and it unreasonably presupposes that there would he no market for bulk storage over the three years of the contract term once CAL abandoned it. *Superfos*, 821 F.Supp. at 441. In fact, as the parties' argument over FCC's alleged bad faith refusal to consent to assignment of CAL's obligations to Martin Marietta Materials, Canada ("MMM") shows, a "better deal" came along during the life of the contract. In 1995, CAL's parent sought to, and ultimately

1. In its 10/23/96 brief (doc. # 42) at 11, FCC stated: "Given representations concerning expected volume made by [CAL representatives], $225,000 (150,000 tons times $1.50) was a conservative and reasonable pre-estimate of the reasonably expected cash flow that would be lost through non-performance. The same stream of revenue would have been generated if approximately half of the amount of aggregate represented by [CAL] had been put through the facility at the regular contract rate of $.90 ton ($250,000 x $.90 per ton would equal $225,000)."

did, sell CAL's assets to MMM, enabling the parent to "get out of the business of importing and exporting aggregate." Doc. # 38 ¶ 4 & Exh. I (Johnson Dep. at 29-30) & Exh. J. CAL then requested that FCC agree to assignment of CAL's obligations to MMM, with CAL to guarantee MMM's performance. *Id.* ¶ 7, doc. # 39 Exhs. K & L. FCC refused, Exh. L, Johnson Dep. at 51, but on 2/1/96 entered into a six-month "through-put" agreement with MMM directly. Doc. # 30 ¶ 7, doc. # 39 Exh. M. That contract contains provisions substantially similar to the FCC-CAL agreement. *Id.* ¶ 8 & doc. # 39 Exh. M.

The $225,000 amount also fails to account for spared transactional costs; with no aggregate actually flowing through, and imposing "wear and tear" costs upon FCC's facility (Gnann's testimony showed that the $.90 per ton figure was not pure profit, but in fact accounted for various costs, including equipment usage, manpower and utilities, Gnann Dep. at 105-07, doc. # 39 Exh. F), FCC's damages are by definition limited to profits lost by CAL's failure to run at least 150,000 tons per year through the facility. Gnann's deposition testimony demonstrates that operation-based profit (and thus the transactional costs) can be calculated — subject to Benton's corrections, *see* 10/23/96 Benton Aff. ¶¶ 4-8 (clarifying that Gnann's calculations must be modified to "allocate all capital costs"). This evidence shows that FCC's lost profits damages are (and were, at the time of the contracting) reasonably ascertainable.

In an attempt to overcome this result, FCC contends that no mitigation duty exists, and thus the above analysis should not be applied, because this is an "absolute promise to pay" case. Doc. # 45 Exh. F. at 12 n. 9. However, there is no dispute that CAL stopped running aggregate shipments through FCC's

facility part way through the contract's three-year term. CAL therefore has not consumed the benefit of that remaining portion of the contract upon which FCC predicates its damages. Hence, CAL has triggered no absolute promise to pay.

The case law illustrates why CAL is supported on this result. In *Victory Sign Industries, Ltd. v. Potter*, 208 Ga. App. 570 (1993), for example, a terminated employee was held to be entitled to severance pay. His employer had unconditionally promised to pay it to him upon *severing* (terminating) him. The employer had thus reaped the benefit of the employee's performance (*i.e.*, the employee had worked long enough to satisfy the employment contract's condition for receipt of severance payment upon termination), so the obligation to pay became absolute, and no duty to mitigate came into play. *Id.* at 571.

In contrast, the employee could not recover, without mitigating his losses, "the remainder of his salary after being terminated prior to the expiration of [his employment contract]." *Id.*; *Royal Crown Companies, Inc. v. McMahon*, 183 Ga. App. 543, 545-46 (1987) (reaching same result and noting that the severance agreement did "not purport to be a stipulated sum for damages for a breach"); *cf. Century 21 v. Cason*, 220 Ga. App. 355 (1996) (upholding $46,000 broker's commission on $575,000 home-residence sale frustrated by defendants, who had signed, then backed out of a contract to purchase; such "payment . . . is not a penalty nor damages, but is simply [the broker's] collection of its commission for services already tendered. . . .").

Finally, CAL's contract with FCC also is, to a reasonable extent, fairly compared to a commercial real estate lease, in

that CAL was paying mostly for guaranteed space inside of FCC's facility and obligated itself to pay, according to FCC, a minimum $225,000 per year ($18,750/month) for "rent." Under this analytical construct, CAL's obligation to pay FCC $225,000 per year (multiplied by however many years remained from the point of CAL's breach) would be comparable to the remaining term of a breached lease under which the landlord has accelerated the remaining rent due and claimed it as "liquidated damages."

In such cases, the remedy is declared an unenforceable penalty. In *Peterson v. P.C. Towers, L.P.*, 206 Ga. App. 591 (1992), for example, a lease acceleration provision was deemed an unenforceable penalty, rather than liquidated damages. *Id.* at 594. The landlord's remedy of present possession of the premises, plus a present lump sum award of future rent included no calculation of damages based on the future rental value of the premises, nor accounted for the likelihood of reletting. *Id.* This provided the landlord with a payment potentially bearing no reasonable relation to his actual damages. *Id.*

In a similar fashion, CAL's default (*i.e.*, because CAL will not be running any more aggregate, it has in essence "vacated" its FCC facility space) implicates the same "lease-acceleration" remedy, with FCC demanding the full $225,000 per year "rent" for the remainder of the contract's three-year term. What has been deemed unenforceable in the real property leasing context must likewise be invalidated here.

The record in this case shows that, while CAL did breach the contract, the parties did not intend CAL to pay an otherwise reasonably ascertainable quantum of damages, but rather a $225,000 per year penalty, effectively enabling FCC to "sit

back and do nothing and collect money." J. Johnson Dep. at 51 (doc. # 39 Exh. I). Thus, CAL is entitled to summary judgment on this issue. In light of the foregoing disposition, it is not necessary to decide whether FCC in bad faith refused to permit CAL to assign the contract to MMM.

III. *CONCLUSION*

Plaintiff Construction Aggregates, Ltd.'s motion for partial summary judgment against defendants Forest Commodities Corporation ("FCC") and Peeples Industries, Inc. ("PII") is ***GRANTED***. FCC and PII's motion for partial summary judgment is ***DENIED***.

SO ORDERED, this 18 day of December, 1996.

s/ B. Avant Edenfield
B. AVANT EDENFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX E — CONSENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED NOVEMBER 6, 1996 AND FILED NOVEMBER 7, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV496-058

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff,

v.

FOREST COMMODITIES CORPORATION AND PEEPLES INDUSTRIES, INC.,

Defendants.

CONSENT ORDER

The parties to the above-referenced action having agreed to continue efforts to resolve certain issues presently presented in the above-referenced action and wishing not to delay the adjudication of other remaining issues, it is hereby ordered that Count I of the Counterclaim asserted by Defendants Forest Commodities Corporation and Peeples Industries, Inc. is dismissed without prejudice. Specifically, without limiting the generality of the foregoing, the dismissal of Count I is made without prejudice to the right of Defendants Forest Commodities Corporation and Peeples Industries, Inc. to bring

a new action to recover full damages allegedly resulting from the May 31, 1995, incident should the parties be unable to resolve the issues presented by Count I of the Counterclaim previously asserted. In agreeing to the dismissal of Count I of the Defendants' Counterclaim, Plaintiff expressly acknowledges that it will not assert in any subsequent action or proceeding that the Defendants' claims are barred based on an argument that claims relating to the May 31, 1995 incident should have been maintained as a Counterclaim in this action. Specifically, without limitation, Plaintiff agrees that it will not assert any defense or res judicata or collateral estoppel based on an argument that the claims dismissed without prejudice or similar claims could have or should have been maintained in this action.

This 6 day of Nov., 1996.

s/ B. Avant Edenfield
JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

CONSENTED TO:

HUNTER, MACLEAN, EXLEY & DUNN

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Appendix E

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APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING SUGGESTION FOR REHEARING DATED AND FILED NOVEMBER 12, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-8745

CONSTRUCTION AGGREGATES, LTD.,

Plaintiff-Counter-
Defendant-Appellee,

versus

FOREST COMMODITIES CORPORATION, PEEPLES INDUSTRIES, INC.,

Defendants-Counter-
Claimants-Appellants.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: EDMONDSON and BIRCH, Circuit Judges, and LAWSON*, District Judge.

BY THE COURT:

Appellant's Suggestion of Rehearing (or Hearing) En Banc, construed as a motion for reconsideration is denied.

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* Honorable Hugh Lawson, U.S. District Judge for the Middle District of Georgia, sitting by designation.